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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SAMUEL MOORE AND COMPANY and
EATON CORPORATION,

Petitioners,

v.

MULTIFLEX, INC.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Can a dangerous probability of monopolization be inferred in an attempt to monopolize case under Section 2 of the Sherman Act where the defendant's market share was more than halved during the period of the alleged attempt and there were no barriers to entry to the market?

PARTIES INVOLVED

The parties to the proceeding in the court below are those named in the caption of the case in this court. *

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* Samuel Moore and Company is a subsidiary of Eaton Corporation. Other subsidiaries of Eaton Corporation, other than wholly-owned subsidiaries, are the following:

Alligator Ventilfabrik, G.m.b.H.
Asiaphil Cutler-Hammer, Inc.
Axles India Limited
C.H.I. Properties (Private) Limited
Cutler-Hammer (Private) Limited
Culter-Hammer Centroamericana, S.A.
Cutler-Hammer Europa Limited
Eaton Manufacturera, S.A. de C.V.
Eaton, S.A.
Ejeuen, S.A.
Japan Fawick Company, Limited
Nitta-Moore Company, Ltd.
Productos Eaton Civia, S.A.
Puromex, S.A. de C.V.
Sumiju Eaton Soko Systems Company, Limited
Sumitomo Eaton Hydraulics Co., Ltd.
Tamco Cutler-Hammer Pte. Ltd.
Tamco Cutler-Hammer Sdn. Berhard
The Electron Corporation

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The Petitioners, Samuel Moore and Company and Eaton Corporation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 22, 1983.

OPINIONS BELOW

The opinion of the court of appeals is reported at 709 F.2d 980. It is reproduced in Appendix A, *infra*, pp. 1a-30a. The order of the court of appeals denying a petition for rehearing and suggestion for rehearing en banc, dated September 14, 1983, is not reported and is reproduced in Appendix B, *infra*, pp. 1b-2b. The district court's judgment, dated September 4, 1981, is reproduced in Appendix C, *infra*, pp. 1c-7c.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by order dated September 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision involved is Section 2 of the Sherman Act, 15 U.S.C. § 2, which provides as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both such punishment, in the discretion of the court.

STATEMENT

This case involves an alleged attempt to monopolize by Samuel Moore and Company ("Moore"). Moore is accused of attempting to exclude Multiflex Inc. ("Multiflex") from the United States market for hydraulic hose bundles. What makes this case unique is that during the period of the alleged attempt (just over a year), the court below found that Moore's market share plummeted from approximately 80% to slightly over 38%. During this same time, Multiflex's market share grew from zero to just under 62%.[1] Moore was not capable of excluding

[1] The court below greatly confused the issue of Moore's market share by using interchangeably two different sets of market share figures—one in which

(footnote continues)

Multiflex, even if it wanted to. Under these conditions, a charge of attempt to monopolize should fail as a matter of law.

1. Factual Background

Both Moore and Multiflex Inc. ("Multiflex") manufacture hydraulic hose bundles for use by the off-shore petroleum industry. Hydraulic hose bundles are long hoses that are bundled together in cable-like units and wrapped in sheathing material. The bundles are used mainly as links in off-shore drilling blowout prevention ("BOP") systems to connect the drilling platform to an undersea BOP device. 709 F.2d at 984; App. A at p. 2a. The market for hydraulic hose bundles is relatively small. In 1978, total sales were only approximately $1,760,000; in 1979, they were approximately $2,500,000. Plaintiff's Exhibit 190; 790 F.2d at 985; App. A at p. 5a.

Moore pioneered the business of bundling hose for use in BOP systems. It entered the business in 1961 when it was asked to assist in developing and supplying thermoplastic hoses for BOP systems. Tr. IX:46.[2] (Moore also pioneered the development of thermoplastic hose). Throughout the years, Moore developed the technology used in manufacturing hydraulic hose bundles today. Although Moore holds valid patents on some stages of its assembly process as well as on the particular type of hose which it uses, these patents are limited and the necessary technology is in the public domain.

(footnote continued)

it assumed that prior to 1979 Moore held 80% of the market and one in which it assumed that Moore held 100% of the market. The 80% figure is based upon the market definition urged by Moore, which was the worldwide market for BOP devices. The 100% figure is based upon the narrow definition of the market that was urged by Multiflex and accepted below, consisting of only those sales of hydraulic hose bundles that were made by Moore and Multiflex within the United States. The court used the 80% figure when it stated that Moore held at least 80% of the market prior to 1979, and that its market share dropped from 80% to 38%. 709 F.2d at 984, 985; App. A at 3a, 5a. But it apparently used the 100% figure when it found that Moore held 38% and Multiflex over 60% of the market in 1979. 709 F.2d at 985; Appendix A at 5a.

[2] The off-shore petroleum industry is itself a relatively new industry. Moore's innovations with respect to hydraulic hose bundles have generally paralleled innovations in the off-shore drilling industry.

Having developed the product and the industry, Moore was for some years the principal supplier of hydraulic hose bundles; its market share in 1977 was estimated to be 80%. 709 F.2d at 984; App. A at p. 3a. But its market position eroded rapidly as soon as Multiflex entered the market—within only two years thereafter, Moore's share of the market had dropped to approximately 38%. 709 F.2d at 984; App. A at p. 5a.

Multiflex entered the market in 1977. Multiflex's President, Bruce W. McConkey, had been employed as the national sales manager of the Moore division that sold hydraulic hose bundles. In 1974, McConkey left Moore to join a distributor of industrial hose which subsequently became Moore's exclusive distributor in the Houston area. In 1977 McConkey decided to produce hydraulic hose bundles in competition with Moore, and he incorporated Multiflex for that purpose. 709 F.2d at 984; App. A at p. 3a. Funded by an initial investment of $100,000 in equity, a $350,000 working capital loan from the Small Business Administration, and a subsequent $200,000 loan from a family member, McConkey formed Multiflex and mounted his rapidly successful challenge to Moore.[3]

To face this challenge, Moore attempted to maintain its sales relationships with the three original equipment manufacturers ("OEMs") who bought hose bundles from Moore and supplied turn-key BOP systems to the oil driller end-users.[4] Although Moore was apparently successful at first in persuading two of the three OEMs to continue purchasing Moore bundles, Multiflex simply went around the OEMs and began to market directly to end-users.[5]

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[3] The first separate financial statements of Multiflex, prepared as of June 30, 1978, reflect that the total equity investment at its incorporation was $100,000 and that an additional $350,000 in working capital was borrowed from the Small Business Administration. Defendant's Exhibit 68.

[4] OEMs design, manufacture, install, and guarantee turn-key BOP systems. The OEMs quote a price to the end-users for the complete system that includes hydraulic hose bundles and all other system components. The court of appeals also found that during the relevant time period, and prior to the entry of Multiflex, end-users dealt primarily with the OEMs, and not with manufacturers. 709 F.2d at 984; App. A at p. 2a.

[5] Multiflex alleged that Moore had persuaded the three OEMs to refuse to deal with Multiflex. However, Multiflex pointed to only one specific incident of a bid lost with an OEM to Moore, and the court of appeals found that the OEM involved had not agreed with Moore to exclude Multiflex from the market. 709 F.2d at 989; App. A at p. 12a.

The market positions of Moore and Multiflex shifted almost immediately. In 1978, Multiflex's total sales of hydraulic hose bundles—principally to end-users—were over $560,000, 30% of Moore's 1978 sales. By 1979, OEMs as well as end-users had begun to place orders with Multiflex, and its total sales were over $1,650,000—almost double Moore's sales. Moore had achieved a dominant market share of just under 62% of all 1979 hose bundle sales, up from a zero share at the beginning of 1978. 709 F.2d at 985; App. A at p. 5a. The demand for Multiflex's product increased so rapidly that also in 1979 it began construction of an affiliated plant in the United Kingdom which began operating in early 1980. Tr. 11:147-155.

The suit below began when Moore filed a patent infringement action against Multiflex in March, 1978. When it became clear that Multiflex and its supplier had taken steps after the first few months of production to alter the Multiflex design to avoid infringing Moore's patent, Moore dropped its patent claims. Multiflex, however, counterclaimed, alleging that Moore had conspired with the three OEMs to exclude Multiflex from the market in violation of Section 1 of the Sherman Act and had attempted to monopolize the market in violation of Section 2 of the Sherman Act.[6]

The jury found that the relevant market was the United States market for hydraulic hose bundles and that Moore had violated both Section 1 and Section 2, and a treble damage award was entered for $1,648,000.94, before costs and interest. The court of appeals reversed the jury's Section 1 finding because Multiflex had failed to establish any damage related to the alleged conspiracy.[7] 709 F.2d at 989-90; App. A at p. 13a. The court affirmed the finding of an attempt to monopolize, but it remanded for a new trial to determine the amount of the damage award allocable to the attempt claim. 709 F.2d at 993, 999; App. A at pp. 19a, 30a.

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[6] Specifically, Multiflex alleged that Moore had attempted to persuade the three OEMs not to deal with Multiflex by promising to limit its sales to end-users and to sell to end-users at higher prices than to the OEMs. In addition, Multiflex claimed that Moore had disparaged Multiflex's products to various bankers and competitors, saying that Multiflex's product was inferior and its financial condition precarious.

[7] *See* n.5, *supra*.

2. The Decision Below

The court of appeals acknowledged that "[t]he claim of attempted monopolization in this case is an unusual one" because "[r]ather than maintaining market dominance, Moore's market share plummeted from over 80% to approximately 38% in just over a year." 709 F.2d at 991; App. A at p. 15a. The court explained:

> Multiflex is arguing in effect that its own market share would have jumped from almost zero to 80%, rather than 'merely' to the 62% share it achieved in its first two years of operation.
>
> At first sight, it might strain credulity to consider imposing monopolization damages against a firm that rapidly lost, rather than gained market dominance. The claim is more surprising with the recognition that the plaintiff in this case actually gained in market power during the relevant period.

Id.

The court also acknowledged that the offense of attempt to monopolize requires "not a mere or simple risk of monopolization but a dangerous probability of success in the relevant market," 709 F.2d at 990; App. A at p. 13a, citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). But it then found that there was adequate evidence to support the jury's "implicit finding" that there was a dangerous probability of monopolization if only Moore's pre-1978 market position was considered.[8] The court explained:

> Viewing the danger from the proper time perspective, we find a sufficiently dangerous probability that

[8] The court affirmed the jury's determination that the relevant market was the United States market for hydraulic hose bundles. On appeal, Moore argued that the relevant market was the worldwide market for BOP devices, including such markets as the United Kingdom, where other manufacturers held a significant market share and where Moore's sales are minimal. However, the court concluded that "the demands of the market and of foreign governments in overseas markets makes the United States market a reasonable definition of 'relevant market' or 'relevant submarket' for the purpose of this case." 709 F.2d at 993, n.12; App. A at p. 19a.

> Moore would have maintained its monopoly power through illegal means and would have frozen Multiflex out of the market.... We find that Moore's market position in 1977 plus its overt anticompetitive acts indicate a specific intent to monopolize and created a dangerous probability that Moore would injure both Multiflex and the open public market place in violation of Section 2.

709 F.2d at 992; App. A at pp. 18a-19a. In effect, the court inferred a dangerous probability of monopolization from Moore's past (and obviously tenuous) market position and its alleged intent.

The court considered Moore's dramatically declining market share to be irrelevant. It explained, "[w]e do not accept the use of hindsight plus evidence of plaintiff's successful response to defendant's acts to exonerate an antitrust violator who did cause damage to the plaintiff." 709 F.2d at 992; App. A at p. 18a.[9]

The court did not consider the competitive structure of the hydraulic hose market either before, during, or after Moore's alleged attempt to monopolize the market. It merely assumed that Moore's pre-1978 market share represented the ability to control prices and exclude competitors from the market without considering such factors as ease of entry into the market; the small size of the market; Moore's declining market share; or the proven inability of Moore to either control prices or exclude competitors.

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[9] Moore argued that Multiflex had suffered no damages because within only a short period of time Multiflex had actually displaced Moore as the dominant supplier in the market. 709 F.2d at 994; App. A at p. 21a. But the court rejected this argument and found that

> [a]lthough Multiflex ... ended up the victor in this competitive war, this fact does not foreclose interim damages even though this victim of attempted monopolization ultimately benefitted from the monopolistic conduct. The attempt at monopolization could well have hindered or delayed the natural growth of the victim's market share.

709 F.2d at 993; App. A at p. 20a.

REASONS FOR GRANTING THE WRIT

"Dangerous probability of success" is the key to the economic rationality of the attempted monopolization offense. The proper concern of Section 2 is the defendant who can achieve monopoly power—the ability to control prices and output and exclude competitors. At least since *Swift v. United States*, this requirement has been recognized in general terms,[10] but to state the requirement is not necessarily to apply it in a way that makes economic or legal sense. This is where the lower courts, particularly the court below, have failed seriously: often finding a danger of monopoly based on market share or allegedly anticompetitive conduct alone without focusing on the factors that make monopoly more or less likely. Rationality in this area cannot be achieved unless this Court directs the attention of the lower courts to the most important factor in assessing the likelihood of monopoly: barriers to entry.

An aspiring monopolist simply cannot raise prices and restrict output if aspiring competitors may enter the market freely to take advantage of any higher profits or unmet demand. The fact that Multiflex, a new entrant, achieved a dominant market position in less than two years—even in the face of allegedly improper conduct—demonstrates dramatically the absence of any barriers to entry. This case, therefore, is an ideal vehicle to address this issue, resolve the confusion in the lower courts, and conform the scope of Section 2 liability to the scope of its economic and legal rationale.

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[10] In *Swift & Co. v. United States*, 196 U.S. 375, Justice Holmes explained that

> [w]here acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to . . . bring that result to pass, an intent to bring it to pass . . . is necessary in order to produce a dangerous probability that it will happen. . . . [W]hen that intent and the consequent dangerous probability exist, [the Sherman Act], like many others and like the common law in some cases, *directs itself against that dangerous probability* . . . .
>
> . . . .
>
> . . . Not every act that may be done . . . to produce an unlawful result is unlawful, or constitutes an attempt. *It is a question of proximity and degree.*

196 U.S. 396, 402 (emphasis added) (citations omitted).

1. The Decision Below Compounds Confusion in the Lower Courts as to the Scope of the Attempt to Monopolize Offense and What Proof of a Dangerous Probability of Success Requires.

The case law on "dangerous probability of success" has long been in an "almost anarchic" state.[11] The lower courts, with the exception of the Ninth Circuit, continue to state that a dangerous probability of success is required to support liability for attempted monopolization, but understanding and enforcement of this requirement is bewilderingly variable in the opinions.[12] The commentary emphasizes the uncertainty and

[11] "No formulation, standard or even general approach is stated or implied in nearly twenty percent of the cases . . . . One often gets the feeling that intuition alone is at work." Hawk, "Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine," 58 Cornell L. Rev. 1121, 1125, 1135 (1973) (footnote omitted). *See also,* Excerpts from Report of President Carter's National Commission to Review the Antitrust Laws and Procedures, Ch. 8 (1977), *cited in* S. Oppenheim, G. Weston & J. McCarthy, *Federal Antitrust Laws* 406-409(1981).

[12] For cases requiring some showing of a dangerous probability of monopolization, *see e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); *FLM Collision Parts, Inc. v. Ford Motors Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384 (4th Cir. 1974); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied,* 400 U.S. 939 (1979); *Mowery v. Standard Oil Co.*, 463 F. Supp. 762 (N.D. Ohio 1976), *aff'd,* 590 F.2d 335 (6th Cir. 1978); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied,* 429 U.S. 112 (1977); *Pacific Engineering & Production Co. v. Kerr McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977); and *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1 (D.C. Cir. 1977).

The Ninth Circuit expressly rejected the requirement of showing a dangerous probability of success in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964). However, the *Lessig* rule has had an unstable existence even in the Ninth Circuit. Cases decided in that circuit both before and after *Lessig* have undertaken a market analysis to determine the existence of a dangerous probability of monopoly. *See, e.g., Independent Iron Works v. United States Steel Corp.*, 322 F.2d 656, 668 (9th Cir.), *cert.*

(footnote continues)

adds to it with its own wide range of formulations, proposals, and criticism.[13]

Despite this Court's direction that defendants must possess a degree of proximity to achieving monopoly power,[14] there has been a persistent trend in the lower courts to apply a greatly reduced "power" or market position requirement, and to weaken the causal link between the "danger" they find and any real probability of the economic ills of monopoly. *See* P. Areeda, *Antitrust Analysis* ¶ 820 at 337 (1976). In addition to

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(footnote continued)

denied, 375 U.S. 922 (1963); *ALW v. United States Airlines*, 510 F.2d 52 (9th Cir. 1975); and *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). Some recent Ninth Circuit cases, however, have returned to the *Lessig* rule. *See, e.g., Twin City Sportservice v. Charles O. Finley & Company*, 676 F.2d 1291, *cert. denied*, 103 S.Ct. 364 (1982).

[13] *See, e.g.*, Cooper, "Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two," 72 Mich. L. Rev. 373 (1974); Hawk, "Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine," 58 Cornell L. Rev. 1121 (1973); Hibner, "Attempts to Monopolize: A Concept in Search of Analysis," 34 Antitrust L.J. 165 (1967); Smith, "Attempt to Monopolize: Its Elements and Their Definition," 27 Geo. Wash. L. Rev. 227 (1958); P. Areeda, *Antitrust Analysis* 177 (1967); Blecher, "Attempt to Monopolize Under Section 2 of the Sherman Act: 'Dangerous Probability' of Monopolization Within the 'Relevant Market,'" 38 Geo. Wash. L. Rev. 215 (1969); D. Turner, "Antitrust Policy and the Cellophane Cases," 70 Harv. L. Rev. 281 (1956); D. Turner, "The Scope of 'Attempt to Monopolize,'" 30 Record 487 (1975); Note, "Prosecutions for Attempts to Monopolize: The Relevance of the Relevant Market," 42 N.Y.U. L. Rev. 110 (1967); Note, "Attempt to Monopolize: The Offense Redefined," 1969 Utah L. Rev. 704 (1969); Note, "Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite for a Prima Facie Case," 73 Colum. L. Rev. 1451 (1973).

[14] In *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, the Court made clear that a court must analyze a defendant's power within the relevant market to determine whether the defendant possesses the requisite proximity to monopoly power. It explained that "[t]o establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to *appraise the exclusionary power* of the illegal [conduct] in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure . . . *ability to lessen or destroy competition*." 382 U.S. at 177-78 (emphasis added). *See also American Tobacco Co. v. United States*, 328 U.S. 781; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143.

the Ninth Circuit, which has expressly rejected any requirement of a dangerous probability of success, other courts have allowed anticompetitive acts from which intent may be inferred to substitute for a showing of power.[15] Some courts have used extremely narrow market definitions (including even a single product or brand), which have the effect of greatly overstating the defendant's "market" position.[16] *See also Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 586 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962) (refusing to reverse a jury verdict against the defendants when the instruction omitted the dangerous probability requirement even though the court found that to have included the requirement would have been "literally correct"); *Mt. Lebanon Motors v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd on other grounds*, 417 F.2d 622 (3d Cir. 1969) (refusing to direct a verdict for a defendant accused of predatory competition with plaintiff Dodge dealers by subsidizing other Dodge dealers in the market even though the court recognized that the defendant could not have successfully monopolized the market even if it took over all of the sales of Dodge automobiles in the market.)

The most egregious decisions are those which, like the decision below, find a dangerous probability of monopolization even though the defendant's market share actually declined during the period of the alleged attempt. In some instances, like the case below, the courts have ignored evidence of a declining market share and stubbornly found a dangerous probability

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[15] *See, e.g., Huron Valley Publishing Co. v. Booth Newspapers*, 336 F. Supp. 659, 662 (E.D. Mich. 1972) (stating that a "dangerous probability exists when a defendant has sufficient market power *and* a specific intent to achieve monopoly," but nevertheless finding that a defendant who could "hardly be said to enjoy market power" could still be found guilty of an attempt to monopolize if he has "engaged in acts . . . so anti-competitive that an intent to monopolize may be inferred" (emphasis added)).

[16] *See, e.g., Woods Exploration & Producing Co. v. Aluminum Co.*, 438 F.2d 1286, 1303-07 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (defining market as production of gas from a single Texas gas field); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975) (market identified as retail sales of a single brand of automobile).

despite the inherent logical inconsistency.[17] The reasoning of the decision below—finding the defendant's declining market share to be "irrelevant"—simply cannot be squared with a real appreciation of what monopoly power means or the decisions which reflect such an appreciation.[18] Comparison with the cases which have recognized the significance of a defendant's declining market share makes this apparent.

A number of cases have recognized the significance of a defendant's declining market share. In *Lektro-Vend Corp. v. Vendo Corp.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982), for example, the plaintiff alleged that the defendant had attempted to monopolize the relevant market through conduct occurring in 1959 and 1965. The court affirmed a finding that there was no dangerous probability of

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[17] *See also Greyhound Computer v. International Business Machines*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (holding that proof of a dangerous probability of success is not an independent element of attempt to monopolize and affirming the jury's finding of an attempt where the defendant's market share had declined from 82.5% in 1964 to 64.68% in 1970 and was continuing to decline); *Twin City Sportservice, Inc. v. Charles O. Finley & Company*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 103 S.Ct. 364 (1982) (failure to consider evidence that the defendant's market share had declined and the number of competitors and size of the market had increased dramatically). *Cf. William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57, 58 (1982) (finding a dangerous probability of success even though the defendant had a static 22% market share and the dominant firm had increased its market share from 41% to 52%).

[18] The court below found that the dangerous probability that Moore would maintain its alleged monopoly did not materialize "only because of the quality of Multiflex's product and the dedicated and imaginative way the company built a market for it." 709 F.2d at 993; App. A at p. 19a. Under classic formulations of common law attempt doctrine, an attempt is constituted by acts which, but for some intervening factor, would have resulted in consummation of the crime. Here, the court confusedly implies that the intervening "factors" which prevented Moore's acts from maturing into monopoly power were its superior product and marketing techniques. But to say this is to say only that Moore lacked the market power to prevent such competition on the merits by Multiflex, and that the better product "won". It is both confusing and misleading to suggest that Multiflex's very entry into the market was the intervening factor that prevented Moore from maintaining a monopoly in that market.

monopolization because the defendant's market share had dropped from 33% in 1966 to 24% in 1973, its profits had steadily declined, and it had experienced substantial losses in each of the four years preceding the trial. The court explained that evaluating dangerous probability "requires an appraisal of the alleged offender's *ability to achieve the forbidden result*" because, "[i]n an antitrust context, ... [t]he ultimate concern is the firm's actual or threatened impact on competition in the relevant market," 660 F.2d at 271, (citing *Kearney & Trecker Corp. v. Griddings & Lewis, Inc.*, 452 F.2d 279 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972)). As the Sixth Circuit likewise concluded when it was faced with a decline in defendant's market share from 40% to 30% in the relevant period, this evidence "belie[d] whatever inference of capacity to monopolize that may be drawn from the size of its market share," *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982).[19]

The critical importance of barriers to entry in this analysis is identified in *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).[20] There, the court held that a finding of intent to monopolize along with a 50% share of the market for LP gas was insufficient to establish a dangerous probability of monopolization because the market was highly competitive and there were minimal barriers to entry—all that was needed to enter the market was a supply of LP gas, a truck, and perhaps a storage tank.

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[19] *See also Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980) (decline in defendant's market share from 54.5% to 33% over a five year period following the occurrence of conduct which facilitated the alleged attempt); *Diamond International Corp. v. Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968) (finding no dangerous probability of success where there was a decline in the defendant's market share from 52% to 51% during the period of the alleged attempt); *N.W. Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971) (rejecting a claim of an attempt to monopolize where the defendant's market share had declined from 68% to 32%, although this decline was apparently used by the court to find a lack of specific intent, rather than to find an absence of dangerous probability).

[20] The District Court for the Western District of Kentucky recently identified explicitly the importance of barriers to entry in *United States v.*

(footnote continues)

The conflict in approach presented by the decision below is clear and decisive. Had the reasoning of the foregoing cases been applied, Moore could not have been found guilty of an attempt to monopolize. The record demonstrates that there were no barriers to entry to the market for hydraulic hose bundles. Moreover, the fragility of Moore's market position shows that Moore did not possess, nor was it ever likely to possess, the significant market power with which Section 2 is concerned. In finding otherwise, the court below, like so many lower courts, has mouthed the words of the proper legal standard, but completely ignored the most relevant facts. The decision below thus perpetuates and increases the confusion and conflict among the circuits that has characterized this area of the law for too long.

2. This Court Should Make Clear That a Finding of a Dangerous Probability of Monopoly Cannot Properly be Made Without Evaluating the Presence or Absence of Significant Barriers to Entry in the Relevant Market.

No matter how large its market share, a firm can achieve or maintain monopoly power only if its market is insulated from rapid and easy entry by others. *See* L. Sullivan, *Antitrust* § 23 at 79 (1977); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). If a firm attempts to exact a monopoly price in a market where there are no significant barriers to entry, new

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(footnote continued)

Dairymen, Inc., 5 Trade Reg. Rep. (CCH) ¶ 65,651 (W.D. Ky. 1983). The court found that the defendant had violated Section 3 of the Clayton Act and had a specific intent to monopolize the market, but that the government had failed to establish a dangerous probability of monopolization. The court emphasized that during the relevant time period, the cooperative's share of the market decreased from 60.1% to 48.6%, a competitor was selling at prices lower than the cooperative and continued to do so, and the cooperative had been unable to exclude the competitor from the market. The court explained that the central considerations in an attempt to monopolize claim are "whether or not there was a dangerous probability that the defendant could control prices in the relevant market" and "whether or not the defendant had the power to effectively exclude competitors from the market," 5 Trade Reg. Rep. (CCH) ¶ 65,651 at 69,299-38 (W.D. Ky. 1983), citing *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

entrants will be attracted and will capture a portion of the market by selling at a competitive price.[21] In fact, "[i]f the industry is one in which . . . outsiders could rapidly enter if prices were pushed significantly above competitive levels even a share as large as 90% . . . may not confer massive power." L. Sullivan, *Antitrust* § 23 (1977).

The principal sources of barriers to entry are: (1) legal licenses such as governmental franchises, patent monopolies, and trade secret protection; (2) control over essential or superior resources; (3) entrenched buyer preferences; (4) capital market evaluations imposing higher capital costs on new entrants than on established firms; (5) economies of scale; and (6) physical product differentiation.[22] *See* P. Areeda & D. Turner, *Antitrust Analysis* ¶ 409 at 299; L. Sullivan, *Antitrust* § 23 at 77-79 (1977); R. Bork, *The Antitrust Paradox* 311 (1978); *Cf. United States v. United Shoe Machinery*, 110 F. Supp. 295 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. Procter & Gamble Co.*, 356 U.S. 677.[23] Barriers to entry are significant in an antitrust context when

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[21] Entry may still be deterred if the firm charging the supracompetitive price has excess capacity that would be sufficient to supply the demand at a competitive price. Potential entrants may then be deterred because they believe entry will create excess capacity leading to below average-cost pricing. *See* P. Areeda, *Antitrust Analysis* ¶ 409a at 299 (1967). However, the record below clearly demonstrates that there was no excess capacity in the market. In fact, in order to keep up with increased demand for its product, Multiflex had to construct a second plant only two years after its first plant became operational. Moreover, Multiflex has never claimed that Moore priced its product below cost, or that Multiflex was forced to do so to remain competitive.

[22] A firm's market share is less significant where the relevant product is homogeneous because it is easier for other firms to compete on the basis of price. *See* F. Scherer, *Industrial Market Structure and Economic Performance* 186-192 (1970). Firms are more likely to succeed in increasing their market share by reducing their prices where price is the predominant plane of competition and cross elasticity between suppliers is very high, and this condition exists where the product market is not highly differentiated. *See* L. Sullivan, *Antitrust* § 24 at 80 (1977).

[23] *See also* M. Porter, *Competitive Strategy* (1980), which lists six major sources of barriers to entry: (1) economies of scale; (2) product differentiation; (3) capital requirements; (4) switching costs (*i.e.*, " one-time costs

(footnote continues)

they permit a firm to exclude from the market equally or more efficient competitors.[24]

Multiflex's ability to convert a zero market share to 62% in only thirteen months dramatically and incontrovertibly demonstrates that there were no significant barriers to entry to the market for hydraulic hose bundles. There were neither economies of scale nor government restrictions, and Moore had no control over essential or superior resources needed in the manufacture of the bundles. The market for hydraulic hose bundles is not highly differentiated. Multiflex required an initial capital investment of only $450,000, and it has never claimed that it was forced to pay more to attract those funds than Moore has had to pay. Although Moore held patents on

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(footnote continued)

facing the buyer of switching from one supplier's product to another's"); (5) access to distribution channels; and (6) cost disadvantages independent of scale (including proprietary product technology, favorable access to raw materials, government subsidies, and the learning or experience curve).

The significance of barriers to entry was illustrated in *United States v. United Shoe Machinery*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). The district court found that the defendant had a market share of between 75% and 95%, but refused to predicate its finding of market power on market share alone. Instead, the court identified numerous barriers to entry which, along with the defendant's market share, indicated market power, including: an accumulation of many patents which by their number and complexity would deter an entrant from attempting to innovate around the patents to enter the market (*Id.* at 332-33); a discriminatory pricing policy under which returns on simple machines most likely to attract entrants were kept low, and returns on more complex machines were kept high (*Id.* at 325-29); static or declining aggregate industry demand which made the industry unattractive to new entrants (*Id.* at 301); and various market practices (such as a "lease only" policy which encouraged a firm which leased one of the defendant's machines to lease other machines from it as well) (*Id.* at 314-15).

[24] *See* R. Bork, *The Antitrust Paradox* 310-329 (1978) (distinguishing between "natural" efficiency-related barriers to entry which are not the subject of the antitrust laws and "artificial" barriers to entry which are unrelated to the relative efficiency of competitors); R. Posner, *Antitrust Law: An Economic Perspective* 188 (1976) (defining predatory pricing as "pricing at a level calculated to exclude from the market an equally or more efficient competitor." The concept of barriers to entry in the context of predatory pricing is the same as with regard to attempted monopoly—both involve unilateral behavior aimed at excluding competitors from the market).

some of its assembly processes and a particular type of hose it used, Multiflex was able to develop a comparable non-infringing innovation within only a couple of months after beginning production. It has never claimed that its costs of doing so exceeded Moore's own development costs. In sum, the record completely fails to show that there were any barriers to entry to the market. This inescapably leads to the conclusion that Moore did not have the power to control prices or exclude competitors—a conclusion most dramatically illustrated by Multiflex's own performance.

This Court should make clear that in determining whether a dangerous probability of monopolization exists, it is essential to examine the allegedly threatened market. If the market is not characterized by significant barriers to entry—such as the market in this case—then there is no dangerous probability of monopolization as a matter of law.

3. This Court Should Forestall the Growing Use of Section 2 of the Sherman Act as a General Code of Unilateral Business Conduct.

This and similar decisions below, which divorce Section 2 attempt liability from any real examination of market impact, fuel the growing use of Section 2 as a general statutory prohibition of unfair competition.[25] This Court should act to forestall that tendency.

Market power is central to the attempt offense for compelling practical and legal reasons. First, failure to assess the defendant's actual power to achieve a monopoly in the market leaves "virtually no perimeters on the prohibitions of Section 2." J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2], n.32 (1982). Moreover,

> it does not seem possible in any rational scheme to avoid entirely the question of the degree of power. In

[25] P. Levine, "Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case," 73 Colum. L. Rev. 1451, 1467 (1973); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512; *Hunt v. Crumboch*, 325 U.S. 821; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143.

> assessing restrictive business conduct that is at the same time ancillary to competition on the merits, the degree of market power seems inescapably relevant.

P. Areeda & D. Turner, *Antitrust Law* at §§ 831, 833d (1978). *See also* Smith, "Attempt to Monopolize: Its Elements and Their Definition," 27 Geo. Wash. L. Rev. 227, 235 (1958). Refusal to look at market power allows a court to decide "intuitively," without any intelligible basis, that a competitor's conduct was "unfair," and that it therefore was an "attempt to monopolize," without ever linking the unfairness to any real risk of monopoly power, and even without considering evidence that there was no link.

Second, as Professors Areeda and Turner note, "whatever our desire to police 'improper' behavior may be, we are nonetheless faced with a statute which uses the word 'monopoly,' and with years of interpretations which tie that word to conceptions of true market power." P. Areeda and D. Turner, *Antitrust Law* ¶ 833d (1978).

Third, and perhaps most importantly, applying Section 2 without regard to the defendant's actual ability to achieve or maintain monopoly power can have a devastating affect on the very competition Section 2 is intended to promote. Minor degrees of market power resting on product differentiation, the defendant's status as a pioneer in the industry, and other such factors are not only pervasive, but perfectly acceptable and normal by-products of the competitive process. A general disregard for market power (or a general lowering of the threshold degree of market power required) would thus threaten "overdeterrence [of] salutory or procompetitive conduct," *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41.

Finally, the practical importance of this issue is demonstrated by the frequency and ease with which attempt to monopolize claims are advanced. As Professors Areeda and Turner have noted, "[t]he lure of treble damages and attorney's fees—without the common law's limitations on tort liability and proof of damages—will transform every state tort claim into a federal

treble damage action." P. Areeda and D. Turner, *Antitrust Law* ¶ 833.[26] The potential plaintiff can plead any conduct by a substantial participant in the market; there is precedent for finding a danger of monopoly in an appreciable market share alone; and there is no definitive guidance which tells the lower courts that a Section 2 defendant must have the wherewithal to become—or remain—a "monopolist."

The need for guidance on the limits of Section 2 has long been recognized in the cases[27] and by the commentators.[28] This Court should take the opportunity to articulate the proper scope of Section 2 and the nature of the proof required to demonstrate the existence of a dangerous probability of monopolization.

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[26] The experience of the Ninth Circuit illustrates the disproportionate frequency of attempt claims when no realistic dangerous probability of success is required to be shown. In fiscal year 1981, more antitrust appeals were taken to the Ninth Circuit than to any other circuit—135 of 391, or 35% of all such appeals. *See* Annual Report of the Director for the Administrative Office of the United States Courts—1981, Table B7, at A-12 (prelim. ed. 1981). By expressly eliminating the requirement of showing a dangerous probability of monopolization, the Ninth Court has "encouraged a greater number of . . . suits where evidence of market power is all but nonexistant . . . . [It] has written over thirty opinions on this one topic since . . . [1964], or more than one third of all the appeals reported on attempted monopolization during that time in all the circuit courts." Handler & Steuer, "Attempts to Monopolize and No Fault Monopolization," 129 Pa. L. Rev. 125, 174 (1980).

[27] *United States v. Dairymen, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 65,651 at 69,299-38 (W.D. Ky. 1983) (noting that "[t]he courts have had a great difficulty in articulating the standard by which a dangerous probability of success is measured").

[28] *See* n.13, *supra*.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 13, 1983

APPENDIX A
FIFTH CIRCUIT COURT OPINION

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 81-2405

MULTIFLEX, INC.
Plaintiff-Appellee,

v.

SAMUEL MOORE & COMPANY, AND
EATON CORPORATION,
Defendant-Appellants.

Max Hendrick, III, Stephen C. Tarry, Houston, Tex., for defendants-appellants.

Bernarr Roe Pravel, Thomas F. Marsteller, Jr., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before WILLIAMS and JOLLY, Circuit Judges, and WILL*, District Judge.

JERRE S. WILLIAMS, Circuit Judge.

This is an antitrust case under sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, seeking damages under section 4 of the Clayton Act, 15 U.S.C. § 15. The plaintiff, Multiflex, Inc., is a relatively new corporation that manufactures hydraulic hose bundles for use in oilfield drilling

* District Judge of the Northern District of Illinois, sitting by designation.

equipment. The defendant, Samuel Moore & Co.,[1] is a long-established maker of similar hydraulic hose bundles and other technical industrial hoses. At trial, Multiflex sought monetary damages for conspiracy in restraint of trade and attempted monopolization. The district court entered judgment of $549,362.98 before trebling.[2] We affirm in part, reverse in part, and remand.

I. THE STAGE SETTING

A. The Industry in Perspective.

Hydraulic hose bundles are sets of long, high-pressure hoses that are bundled, or wrapped, with plastic or other sheathing substances to produce an integral, cable-like unit. The main use for these bundles is in the oilfield equipment industry, where they are used as a component of blow-out prevention (BOP) systems. BOP devices are sophisticated, high-pressure hydraulic systems designed to monitor oilfield activities to prevent blow-outs.

The market for BOP devices is dominated by three original equipment manufacturers (OEMs), which design, manufacture, install, and guarantee a virtual turn-key system. The OEMs quote a price to the end users for a complete system that includes hydraulic hose bundles and all other system components. The OEM benefits under this "total systems" approach because it can tack a profit margin onto its wholesale cost for the hose bundles and other system components. The end user benefits from the simplicity of buying from a single

[1] Shortly before trial, Samuel Moore & Co. was acquired by the Eaton Corporation and ceased to exist as a separate corporate entity. However, for clarity's sake, the district court referred to the defendant as Samuel Moore & Co., a convention we adopt in this opinion as well. Eaton Corp. has been properly named a party to this proceeding.

[2] The jury awarded damages of $382,963.07 under the conspiracy claim and $205,964.73 under the attempted monopolization claim, for a total of $588,927.80 before trebling. However, before the entry of judgment Multiflex filed its consent to reduce damages under the verdict to $549,362.98. The district court entered judgment for this reduced figure on September 4, 1981, five days after the jury's verdict. Damages were then trebled to $1,648,088.94. The damages figure is discussed further in Part IV of this opinion.

vendor and relying on a single guarantee. Although an end user occasionally buys original hoses or replacement bundles directly from the manufacturer, most sales of hydraulic hose bundles are made through the OEMs as middlemen.

B. The Parties in Perspective.

The company credited with establishing the hydraulic hose bundle market is Samuel Moore & Co. (Moore). Moore holds a patent on its method of bundling the cables, [3] and has been at the forefront of helping the OEMs incorporate these hose bundles into their BOP systems. For many years up until 1978, Moore enjoyed a dominant position in the hydraulic hose market, controlling at least an 80% share of the U.S. market. [4]

Bruce W. McConkey, the President of appellee Multiflex, Inc., worked for Samuel Moore & Co. from 1964 to 1974. His ultimate position was national sales manager of the Synflex division, the Moore unit that sold hydraulic hose bundles. In 1974, McConkey left Moore and became associated with Flow Products of Houston, Inc., an industrial distributor. Due to McConkey's close and friendly relationship with Moore, Synflex dropped all other distributors in the Houston area and appointed Flow Products its exclusive distributor in this major market. This arrangement continued amicably for three years.

In 1977, McConkey decided to start producing hydraulic hose bundles in competition with Moore. He contracted with Gates Rubber Co. to arrange for a dependable supply of hosing, and made other preliminary arrangements. The new company, called Multiflex, Inc., was incorporated in March, 1977. Its first business goal was to purchase basic hosing from Gates Rubber Co., sheathe the hosing into bundles, and sell the hydraulic hose bundles as oilfield equipment.

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[3] U.S. Patent No. 3,905,398.

[4] The parties dispute Moore's exact share of the "relevant market," as that market is defined in this case. Multiflex asserts a virtual 100% stranglehold on the market until 1978, while Moore admits to "at least an 80-85% market share." Either figure, however, is sufficient to establish market dominance for the purposes of this case.

Moore learned of Multiflex's existence in May, 1977, at which point Moore and McConkey reached a peaceable agreement to terminate Synflex's distributorship with Flow Products due to conflicts of interest. Multiflex was still making preparations for production at that point, and did not achieve manufacturing capability until November 1, 1977.

C. The Competitive Process in Perspective.

Multiflex approached the three OEMs in late 1977, just before it developed production capability. It hoped to show that its superior product at lower cost was a better deal than Moore's bundles. But the OEMs placed no orders with Multiflex at this time, preferring to remain loyal to Moore. Earlier entrepreneurial attempts to enter this market had met a similar lack of success.

In October, 1977, a Dallas-based drilling company, the Sedco Co., was in the market for a hydraulic hose bundle. Multiflex approached Sedco to offer its product, and Sedco was interested in a price quote. Multiflex, however, claims it asked Sedco to obtain a quote directly from the OEM that would be manufacturing the complete device, because it did not wish to disturb the established channels of distribution. Sedco obtained a quote for a Multiflex bundle from the OEM.

Moore, learning of the Multiflex bid, then submitted a lower-than-normal bid directly to Sedco, bypassing its normal distributor network. The price was slightly higher than the OEM bid based on the use of the Multiflex bundle. Moore pressured the OEM to promote the Moore product. The evidence shows that the Multiflex product was at least equal in specifications to the Moore bundle, and that Multiflex, unlike Moore, was able to promise the required short delivery time. Nevertheless, a Moore bundle was used on the Sedco job. This lost sale was later used as evidence of Multiflex's "fact of damage" in its antitrust charges.

Multiflex made a few small sales in 1977, but decided that to remain competitive it would need to bypass the traditional marketing structure utilizing the OEMs and approach the end users directly. The end users, mostly offshore drilling con-

tractors, were quite favorably impressed with the new Multiflex line, and 1978 sales totaled over $560,000, mostly to end users. Eventually, even the OEMs began placing some orders through Multiflex. Multiflex expanded in the U.S., and established a manufacturing facility in the United Kingdom. In 1979, Multiflex's sales totaled over $1,650,000, almost doubling Moore's 1979 sales of approximately $850,000. By 1979, Multiflex was the dominant supplier in the U.S. market for hydraulic hose bundles with over a 60% market share, while Moore's share dropped from over 80% to approximately 38%.

Throughout, Moore had kept a careful eye on the upstart competitor sired by its former employee. When Multiflex bought its first hose from Gates Rubber Co. and produced its first hydraulic hose bundles, Moore closely investigated the completed bundles to see if they infringed upon the Moore patent covering many aspects of hydraulic hose bundle design and manufacture. After an investigation and a call to its patent attorneys, Moore filed a patent infringement action against Multiflex on March 22, 1978.

Multiflex answered the suit by denying the patent infringement charges and counterclaiming with several antitrust charges. It later became clear that Gates and Multiflex had taken steps after the first few months of production to change the Multiflex design and eliminate any possibility of patent infringement. Moore eventually dropped its patent claims. Multiflex, however, continued to pursue its antitrust charges. Its amended complaint included claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and the treble damages provision of section 4 of the Clayton Act, 15 U.S.C. § 15. The parties were appropriately realigned, and these antitrust claims constitute the present suit. Jurisdiction in the district court was proper under 15 U.S.C. § 15.

The case was presented to a jury in a trial lasting six weeks. The jury found the relevant market to be the U.S. market for hydraulic hose bundles; found section 1 liability and awarded section 1 damages of $382,963.07; found section 2 liability and awarded section 2 damages of $205,964.73. Multiflex accepted a slightly-reduced judgment of $549,362.98 and amended its

pleadings to conform with the verdict. The trebled award was entered for $1,648,088.94, before costs and fees. The trial court denied motions for judgment n.o.v. or new trial. Moore files this timely appeal, 28 U.S.C. § 1291.

II. SECTION 1 CLAIM

Multiflex charges that Moore entered into a conspiracy in restraint of trade, in violation of section 1 of the Sherman Act. It alleges that Moore met with the three OEMs during the early days of Multiflex's existence to convince the OEMs not to enter into contracts with Multiflex.[5]

A. The Applicable Law.

Under the Sherman Act, conspiring in restraint of trade is illegal, even if the conspiracy does not in fact lead to an actual restraint of trade. *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96, 98 (1st Cir. 1932). Unlike a contract or other combination in restraint of trade, a conspiracy violates the Sherman Act ever without proof of injury because of the surreptitious, pernicious effect a conspiracy ultimately can have upon a free market. Violation of the Sherman Act is therefore not dependent on damage, although no damages can be

[5] The OEMs, Multiflex's best customer prospects, are not named in this suit. It is easy to see how Multiflex would hinder its long-term success in the marketplace if it sued its intended customers. "The antitrust laws do not require a business to cut its own throat." *Brown* v. *Western Mass. Theatres, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961). However, a conspiracy charge need not be filed against all co-conspirators to be valid. A conspiracy conviction may lie against a single indicted party, even though the legal definition of conspiracy requires two or more persons acting in concert. *United States* v. *Albert*, 675 F.2d 712 (5th Cir. 1982); *United States* v. *Sheikh*, 654 F.2d 1057 (5th Cir. 1981), *cert. denied*, 455 U.S. 991, 102 S.Ct. 1617, 71 L.Ed.2d 852 (1982) (conspiracy defendant may be convicted of conspiring with unindicted parties if the evidence supports their existence and the existence of a conspiracy). *Cf. Herman* v. *United States*, 289 F.2d 362 (5th Cir.), *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961) (conspiracy conviction may not lie against only one of several indicted parties in a *combined* trial); *United States* v. *Davila*, 698 F.2d 715 (5th Cir. 1983) (conspiracy conviction may lie against one of several indicted parties in *severed* trials).

recovered unless proved. Federal law does not provide for automatic monetary damages as an antitrust remedy. *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F.2d 575, 578 (5th Cir.), *cert. denied*, ____U.S.____, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982) (discussing § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a)), *citing Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

The term restraint of trade could not cover all possible restraints, or else the antitrust laws would eliminate the entire system of commerce. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948). Rather, the term includes two types of unlawful acts. The major category, *unreasonable* restraints of trade, includes business practices that violate general principles of fair dealing and free trade. The legal standard, generally called the rule of reason, leaves the ultimate determination of reasonableness to a jury. The prohibited acts are those with a threatened impact on competition. *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). The inquiry concerns effect on *competition*, not on *competitors*.[6] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 300, 82 S.Ct. 1502, 1510, 8 L.Ed.2d 510 (1962); *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir.), *cert. denied*, 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 102 (1981). *Almeda Mall, Inc.* v. *Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870, 101 S.Ct. 208, 66 L.Ed.2d 90 (1980). The legality of most restraints of trade, including the vertical market restrictions at issue in this case, is determined under the rule of reason analysis.

Some violations, however, are so damaging to a system of free and open competition and so devoid of legitimate business purpose that courts have labeled them per se violations not

[6] While the section 1 rule of reason analysis requires an impact on completion, section 4 of the Clayton Act requires evidence of private injury to support a private sector recovery. A private plaintiff pursuing a restraint of trade case therefore must prove both marketplace and private injury at some point in the case. Yet such evidence may overlap, since evidence or injury to a competitor may suggest damage to the competitive marketplace.

subject to the rule of reason. *E.g., Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). These per se claims, including price fixing and horizontal exclusions from the marketplace, *see United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed. 2d 515 (1972), are not involved in the case before us. The parties have stipulated that all restraints of trade alleged in this case are subject to the rule of reason. *Continental TV, Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549 53 L.Ed.2d 568 (1977); *Affiliated Capital Corp.* v. *City of Houston,* 700 F.2d 226 (5th Cir. 1983).

Even though a conspiracy in unreasonable restraint of trade may be proved, to justify a private suit the plaintiff must additionally demonstrate injury under the standard of section 4 of the Clayton Act, 15 U.S.C. § 15. *McClure* v. *Undersea Industries, Inc.,* 671 F.2d 1287, 1289 (11th Cir. 1982), *cert. denied,* ____U.S.____, 103 S.Ct. 1427, 75 L.Ed.2d 788 (1983); *Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309, 317 (5th Cir. 1978). Under section 4, such a showing of injury requires proof of the "fact of damage" and some general proof as to the amount of damage. *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307, 1320 (5th Cir. 1976); *Kestenbaum* v. *Falstaff Brewing Corp.,* 514 F.2d 690, 695 (5th Cir. 1975), *cert. denied,* 424 U.S. 943, 96 S.Ct. 1412, 47 L. Ed.2d 349 (1976). A violation without private injury to the plaintiff cannot support an award of money damages under section 4, even though the defendant's behavior could support injunctive relief, a monetary award in favor of another private plaintiff, or a judgment in favor of the United States as parens patria. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130-31, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969).[7] With this general statement of the law as a backdrop, we turn to the section 1 claims involved in this case.

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[7] In *Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309, 317 & n. 17 (5th Cir. 1978), we explained the distinction between a Sherman Act violation and private recovery:

> Proof of a violation of the Sherman Act standing alone does not establish civil liability under § 4 of the Clayton Act. There must

(footnote continues)

B. The Conspiracy and the Rule of Reason.

Multiflex alleged at trial that Moore met with the principal customers for hydraulic hose bundles (the three OEMs) and conspired to keep Multiflex out of the market by suggesting exclusive and profitable arrangements between Moore and the OEMs. The allegation is supported by several internal Moore memos. One such memo, dated October, 1977, acknowledges that Moore is no longer alone in the relevant market, and that the company must decide "just exactly how we are going to structure ourselves for this onslaught." It considers as one course of action a meeting with the three OEMs to "see what we can all do to keep these other guys out of it."

Another Moore memo, dated January, 1978, reports meetings in that same month between Moore and the OEMs at which the business activity of Multiflex was discussed. The memo claims that at these meetings, two of the three OEMs agreed not to buy bundles from any source other than Moore. All three OEMs stated, according to the Moore memo, that they hoped the days of high profit margins would return, "but for the most part it is a war situation now." The memo concluded that Moore believed the OEMs would support its plans to keep Multiflex from gaining a toehold in the market:

> We are thinking over everything that was said there and how the three meetings went, and the probability is that we will go forward with the plan as

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(footnote continued)

> under § 4 be proof of "injury to business or property" before a Sherman Act violation becomes cognizable as a private civil remedy. . . . [A]wareness of the distinction between conduct which violates § 1 of the Sherman Act, and the elements which establish liability in private party litigation under § 4 of the Clayton Act, is vital.

An example of the importance of this distinction would be a conspiracy to establish *maximum* prices. This form of price-fixing would clearly violate the Sherman Act, see, *e.g. Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), but would not be a cognizable action under § 4 on behalf of retail customers because they most likely would not have suffered injury as a result of such acts. (Emphasis in original.)

> we took it to Houston. We will have the support of [two of the OEMs]; however, we are not certain of the support we'll get from [the third]. It is essential to counteract McConkey's work and to try and cause him to lose every single thing that he bids, as he will only get stronger. This may indeed cause us to go much, much lower than we would care to go; however, the objective is to try and remain in the number one position in this business.

The various Moore memos suggest that Moore initiated a conspiracy with the three OEMs to exclude Multiflex from the market and retain its market dominance. In return, Moore offered the OEMs the promise of higher profit margins by agreeing to limit its direct sales to end users and to sell at "substantially higher prices to end users than to the OEMs."

Witnesses at trial provided further evidence of restraints in trade performed for the sole purpose of destroying Multiflex. An antitrust conspiracy is rarely shown by direct evidence, and usually is proved by inference and suspicion, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948). It is "enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Interstate Circuit* v. *United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610 (1939). In this case, however, the plaintiff was able to produce the defendant's own "smoking guns" with the result that there was ample evidence of a conspiracy to restrain trade.

Even though the existence of conspiracy is demonstrated, the proof must still show the intended restraint was unreasonable. The question of reasonableness is a fact question for the jury. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). There is sufficient evidence to uphold the jury's determination in this case that the restraint was unreasonable. The record suggests that Moore set up its meetings with the OEMs in an attempt to keep Multiflex out of the market. The OEMs realized that compliance with Moore's proposals would mean greater profits for themselves as direct-dealing competitors to Moore were

eliminated. The goal of the conspiracy was to eliminate one of the only two manufacturers. While the conspiracy was in force, customers were discouraged from buying from anyone other than Moore. This evidence forms a proper basis for a jury to find an unreasonably dangerous effect on competition.

As in any case with sufficient merit to survive motions for summary judgment and reach a jury, there is evidence in this case to support a contrary result. Moore claims it was only meeting with its customers to apologize for the occasional need to make direct sales to end users with the effect of "freezing out" the OEMs as to those sales. It claims the OEMs were amenable to exclusive dealings with Moore based only on lawful considerations such as reliability in deliveries and quality of products. However, our role as an appellate court is not to adjudge the evidence de novo. We must affirm factual findings that are in accordance with the law and supported by credible evidence. There is sufficient credible evidence that Moore played the organizing and dominant role in a conspiracy undertaken to achieve an unreasonably dangerous effect on competition. We find that the record supports the claim of violation of section 1 of the Sherman Act.

C. Fact of Damage.

To obtain any private monetary award based on the violation of section 1, a plaintiff must prove an injury to its business or property, the so-called "fact of damage." The fact of damage showing does not require the antitrust plaintiff to prove with particularity the full scope of profits that might have been earned in the absence of unlawful activity in restraint of trade. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 45-46 (5th Cir.), *cert. denied*, 409 U.S. 2077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). It requires only that a plaintiff show with some particularity an element of actual damage caused by the defendant's violations of the antitrust laws. [8] We

[8] The "fact of damage" is an element of the plaintiff's burden of proof, which requires a showing by a preponderance of the evidence. Once the fact of damage is shown, a jury may use its discretion in determining the exact

(footnote continues)

find that this prerequisite to a damage award was not met in the conspiracy proved under Section 1 of the Sherman Act.

To show the fact or damage, Multiflex points to the October, 1977, Sedco bid, where Multiflex presented substantial evidence that it was not given an opportunity to compete fairly for the job. Multiflex showed that it would have provided quality bundles at a lower cost than Moore with guaranteed fast delivery as required, but that Moore's anticompetitve maneuvers kept Multiflex from winning the bid. Overall, the evidence supports the inference that Multiflex would have earned this Sedco job in the absence of Moore's misconduct. The evidence also shows, however, that the OEM manufacturing the complete device for Sedco did not join with Moore in the attempt to freeze out Multiflex. The OEM quoted Sedco a competitive price on the Multiflex bundle and refused pressures from Moore employees to badmouth the Multiflex product. The angry memos presented at trial between Moore and the OEM regarding the Sedco job make it clear that the OEM was not on Moore's side of the fence during the Sedco bidding.

The evidence Multiflex has presented to show the existence of conspiracy points to the January, 1978, meeting between Moore and each of the OEMs as the starting date of the conspiracy. Moore officials may have had a conspiracy in mind at the time of the Sedco episode in October of 1977, or earlier, but there is no showing a conspiracy was born until the OEMs joined into conspiracy with Moore in January, 1978. Since the bidding for the lost Sedco job took place before the establishment of the conspiracy, this episode cannot establish a fact

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(footnote continued)

amount of damage resulting from the antitrust violation. By separating the fact of damage determination from the amount of damage computation, an antitrust plaintiff benefits from a "relaxed standard" of showing quantum once the fact of damage is proven. *See generally Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Application of this rather unique damage scenario under the antitrust laws is described also in our discussion of the claimed section 2 violation (parts III, C, and IV, *infra*).

of damage resulting from a section 1 conspiracy claim.[9] Yet this episode is the only one upon which fact of damage was based.

There must be a causal connection between the violation shown and the injury asserted to support a private sector award of money damages. *See In Re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981), *cert. granted*, 456 U.S. 971, 102 S.Ct. 2232, 72 L.Ed.2d 844 (1982); *Gainesville Utilities Dept.* v. *Florida Power & Light Co.*, 573 F.2d 292, 294 n. 3, 304-05 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978). At the time of the Sedco bidding, Moore was acting alone and not pursuant to a contract, combination, or conspiracy. Therefore, Multiflex has not shown adequate "fact of damage" related to the conspiracy claim and cannot recover treble damages under section 4 of the Clayton Act based on its section 1 conspiracy claim.[10] The district court's award of damages under the section 1 theory must be reversed.

III. SECTION 2 CLAIMS

A. The Applicable Law.

Multiflex's other antitrust claim is one of attempted monopolization under section 2 of the Sherman Act, 15 U.S.C. § 2. Monopolization as a legal offense involves more than mere possession of market power. A company can hold a monopoly through one of several legal means, including legislative grant, valid patent rights, or simply through business acumen or a superior product. *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).

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[9] If a conspiracy had been in effect at the time of the Sedco bidding, parties later entering into that conspiracy properly could be charged with knowledge of, hence liability for, earlier acts of the coconspirators. *United States* v. *Davis*, 666 F.2d 195 (5th Cir. 1982). However, no one else was conspiring with Moore to keep Multiflex from the market in October, 1977. One party does not a conspiracy make. *Herman* v. *United States*, 289 F.2d 362, 368 (5th Cir.), *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961). Hence, we cannot allow damages under section 1 for events occurring before the instigation of the conspiracy, namely January, 1978.

[10] We therefore need not rule conclusively on the theoretical question of whether section 1 was violated in the abstract. The evidence, regardless of merit, was not presented by a party deserving of the relief sought.

Monopolization as a legal offense requires that a company engage in overt anticompetitive acts to acquire or maintain monopoly power.

Attempted monopolization under section 2 is usually defined as an unsuccessful attempt to achieve monopolization. *E.g., American Tobacco Co.* v. *United States,* 328 U.S. 781, 785, 66 S.Ct. 1125, 1127, 90 L.Ed. 1575 (1946). The offense requires not a mere or simple risk of monopolization, but a "dangerous probability of success" in the relevant market. *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *H & B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239 (5th Cir. 1978). This dangerous probability can exist event though the attempt ultimately is unsuccessful. Indeed, it is only the failure of the scheme that keeps the charge from becoming actual monopolization.

Attempted monopolization also requires proof of a specific intent to monopolize, unlike the offense of actual monopolization, which is unlawful even without proof of specific intent. *See Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). Finally, the charge demands evidence of overt acts in furtherance of the scheme to monopolize. Claims of attempted monopolization may overlap section 1 claims of restraint of trade, but the charges are not idential: a restraint of trade may be reasonable and therefore not prohibited by section 1, yet still may constitute an attempt to monopolize if a specific intent to monopolize is shown. *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948).

Under an attempted monopolization theory, a defendant is liable for competitive damages if they are caused by the unsuccessful attempt to monopolize. A private sector suit for such damages is subject to the requirements set forth in section 4 of the Clayton Act, 15 U.S.C. § 15, just as is a section 1 claim. To support private recovery, there must be some indication of a particular injury caused to the plaintiff's business or property by the violation.[11] A violation accompanied only by generalized

[11] While this requirement is closely comparable to the "fact of damage" requirement discussed under Section 1, the courts typically do not use "fact of damage" as a phrase of art under section 2.

damage to the marketplace but no particularized injury could support a request for injunction, or could be pursued by government agencies in an enforcement action, but a private suit for damages can be supported only on a showing of particularized economic injury. Multiflex points to the Sedco affair, discussed earlier in this opinion, as the specific episode of its damage.

The claim of attempted monopolization in this case is an unusual one. The evidence shows that Moore enjoyed market dominance in the hydraulic hose bundle market, due in large part to its valid patent covering several stages of the assembly process. Multiflex's charge is that Moore, while holding this lawful market dominance, acted intentionally and overtly to exclude Multiflex and illegally maintain a monopoly. This case, then, is not an attempt to create monopoly power, but an attempt through illegal means to protect a lawful monopoly against rising competitive challenge. Such a claim could constitute the offense of actual monopolization under section 2. It fails as actual monopolization only because Moore's efforts were unsuccessful. Rather than maintaining market dominance, Moore's market share plummeted from over 80% to approximately 38% in just over a year. Multiflex is arguing, in effect, that its own market share would have jumped from almost zero to over 80%, rather than "merely" to the 62% share it achieved in its first two years of operation.

At first sight, it might strain credulity to consider imposing monopolization damages against a firm that rapidly lost, rather than gained, market dominance. The claim is more surprising with the recognition that the plaintiff in this case actually gained in market power during the relevant period. Even an unsuccessful attempt to monopolize, however, can cause substantial injury both in the marketplace and to a competitor. The central issue in this section 2 claim is whether an unsuccessful attempt to maintain monopoly power through anticompetitive acts can support a section 2 claim under any circumstances and, if so, whether the claim is cognizable under section 4 of the Clayton Act in this private suit.

B. Attempted Monopoly and Lack of Success.

Moore urges on appeal that section 2 cannot apply to this case under any circumstances. It points out that its market share dropped from almost complete control of the U.S. market to a 38% share as Multiflex, the company it allegedly was overpowering, grew from nothing to over a 60% share in only two years. With such overwhelming evidence that Moore lost rather than gained any market power it might have had, and that Multiflex prospered rather than suffered during the relevant period, Moore urges that as a matter of law there could be no showing of a "dangerous probability of success." Moore relies heavily on *Nifty Foods Corp.* v. *Great Atlantic & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980), where the Second Circuit ruled that a loss in the defendant frozen waffle maker's market share from 48.3% to 33.0% from 1969 to 1974 could not, as the only evidence presented, support a claim of a dangerous probability of success under a charge of attempted monopolization.

Multiflex, on the other hand, contends that its ultimate success in the marketplace should not preclude us from finding a violation of section 2. Although it might have pulled out of serious ultimate injury from Moore's conduct, it claims that Moore's anticompetitive acts threatened its ability to continue as an ongoing concern when it was a fledgling venture. Its evidence goes beyond shares of the marketplace. It charges that Moore disparaged Multiflex to bankers and prospective customers, so that Multiflex could not obtain the bank financing it needed to remain in business or bid on equal footing for jobs to the OEMs or the end users. Multiflex claims its problems created a "dangerous probability of success" at that time. Only through a substantial infusion of capital from McConkey's brother-in-law and a radical shift from normal industry marketing strategies was Multiflex able to overcome what it characterizes as a willful, unlawful campaign to crush Multiflex at all costs. Multiflex asserts it was damaged by Moore's acts viewed from a short term perspective, even if it ultimately recovered and overwhelmingly prospered in the marketplace.

Characterization of the claims in this case is not an easy matter. We do not conclude, nor have we found a case to

suggest, that a drop in defendant's market share alone can defeat a claim of attempted monopolization. As the Ninth Circuit stated in *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 496 n. 18 (9th Cir.), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1977):

> The record indicates that IBM's market share is declining. A declining market share may reflect an absence of market power, *see United States* v. *International Harvester Co., supra*, 274 U.S. [693,] at 709, 47 S.Ct. 748 [at 754, 71 L.Ed. 1302 (1947)]; *United States* v. *United States Steel Corp.*, 251 U.S. 417, 439 n. 1, 40 S.Ct. 293 [,295 n. 1,] 64 L.Ed. 343 (1920), but it does not foreclose a finding of such power. *See American Tobacco Co.* v. *United States, supra*, 328 U.S. [781,], at 794-95, 66 S.Ct. 1125 [at 1132, 90 L.Ed. 1575 (1946)].

See Lektro-Vend Corp. v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982) and cases cited.

In the *Nifty Foods* case, the Second Circuit dismissed the claims of attempted monopolization when the *only* evidence of antitrust injury was the defendant's drop in market share, which alone, of course cannot possibly establish wrongdoing by a defendant. Further, the decline in market share was a gradual drop continuing over a period of years. This data, the only evidence presented, could not establish the plaintiff's case. We agree, therefore, with the Second Circuit's holding. The Second Circuit the following year in *Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122, 128 (2d Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), made clear that a drop in market share does not defeat an attempted monopolization claim when there is evidence to support the claim. The court said: "We do not doubt the significance of market share evidence as an indicator of either the presence or absence of monopoly. As the cases and commentators have cautioned, however, the true significance of market share data can be determined only after careful analysis of the particular market." *See also Hunt-Wesson Foods, Inc.* v.

Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981) (large and increasing market share, under proper circumstances, could demonstrate market power).

The fact that a plan violative of the spirit of the antitrust laws ultimately fails does not inexorably lead to the conclusion that there was no "dangerous probability of success." As the court said in *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 1982: "[T]he Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense." The time to examine "dangerous probability" is when the acts occur. We do not accept the use of hindsight plus evidence of plaintiff's successful response to the defendant's acts to exonerate an antitrust violator who did cause damage to the plaintiff.

We find adequate evidence to support the jury's implicit finding that there was a "dangerous probability of success," when we look at the situation at the time of the violation. Viewing this appeal of a jury verdict in the manner most favorable to the verdict, we can state that Samuel Moore & Co. memos showed a clear intent to freeze Multiflex out of the market. We note that Moore told Multiflex's bankers and competitors that Multiflex's products were inferior, that the company was closing down, and that the plant had been shut in anticipation of bankruptcy with Pinkerton security guards posted at the door. Viewing the danger from the proper time perspective, we can find a sufficiently dangerous probability that Moore would have maintained its monopoly power through illegal means and would have frozen Multiflex out of the market. Multiflex amply demonstrated Moore's "overt acts" in furtherance of the attempt to monopolize, and showed anticompetitive behavior from which a specific intent to monopolize can be inferred. The fact that Multiflex was able to overcome the hurdles Moore erected and established a strong market presence should not allow Moore to escape liability, although market success could be expected to affect the quantum of a damage award. We find that Moore's market position

in 1977 plus its overt anticompetitive acts indicate a specific intent to monopolize and created a dangerous probability that Moore would injure both Multiflex and the open, public market place in violation of section 2.[12] This dangerous probability did not materialize because of the quality of Multiflex's product and the dedicated and imaginative way the company built a market for it.

Finding each of the necessary elements to support the jury's verdict, we affirm the district court's holding of a section 2 violation.

C. Antitrust Violation as the Cause of Damage.

Finding the likelihood of attempted monopolization does not end our analysis, however. Since this is a private sector suit for money damages, the plaintiff must also satisfy the requirements of section 4 of the Clayton Act. This means Multiflex must show by a preponderance of the evidence some actual damage to its own business or property that was proximately caused by the antitrust violation.

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[12] Claims of attempted monopolization under Section 2 must be presented within the confines of a well-defined product market. *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976). The definition must set forth both the products in question and the geographic limits of the relevant market. The jury found the relevant market to be hydraulic hose bundles in the United States. It excluded sales of hard metal pipe or other products that might, under certain limited circumstances, substitute for hydraulic hose bundles. Similarly, the jury excluded the United Kingdom market and other foreign markets for offshore drilling equipment.

Moore argues on appeal that the relevant market should be the worldwide market for BOP devices. Under this definition, the jury would have had to consider markets such as the United Kingdom, where other manufacturers hold significant market share and where Moore's sales are minimal, in assessing liability. A worldwide definition of the relevant market would make it more difficult for a jury to find that Moore possessed market power.

The record supports the view that hydraulic hose bundles have no practical substitute in the BOP market, and that the demands of the market and of foreign governments in overseas markets makes the United States market a reasonable definition of "relevant market" or "relevant submarket" for the purpose of this case. We therefore find no error in the jury determination of relevant market.

Although Multiflex in this case ended up the victor in this competitive war, this fact does not foreclose interim damages even though this victim of attempted monopolization ultimately benefitted from the monopolistic conduct. The attempt at monopolization could well have hindered or delayed the natural growth of the victim's market share. A competitor's lawful and successful response to otherwise illegal monopolization activities does not negate the possibility of short term damage. The plaintiff, of course, carries the burden of showing damage.

Multiflex relies on the lost Sedco job, discussed earlier in connection with the section 1 claim, as proof of section 2 damage. We find that this evidence is sufficient to establish injury for purposes of section 4 of the Clayton Act. There is substantial evidence to indicate that Moore mounted a vicious attack against Multiflex during the early days of Multiflex's existence, and that it was prepared to do "whatever it takes" to remain "number one" in the business. The Sedco affair failed as "fact of damage" under section 1 because Moore had not yet induced the OEMs to join in the conspiracy. The attempted monopolization by Moore, by contrast, did not require concerted action. Accepting the jury's verdict as revealing a belief that Multiflex would have earned the Sedco job in the absence of Moore's misconduct, we hold that Multiflex has met its burden of showing injury stemming from the section 2 violation.

To complete the burden necessary to recover under section 4, Multiflex need only show that its injury was proximately caused by the antitrust violation and a showing of the actual dollar amount of the damage. Multiflex must first establish a link between its damages and the values the antitrust laws were designed to remedy. Antitrust plaintiffs

> must prove more than injury casually linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original). The question that must be addressed is whether Multiflex's proven specific instance of damage is related to the section 2 violation.[13]

Moore argues that there can be no private damage award in this case under any circumstances, since Multiflex's market share increased so dramatically in so short a time. It believes that even if it were to concede anticompetitive acts, Multiflex's success in the market negates the requisite connection between conduct and injury, and conclusively offsets any possible recovery. We cannot accept such a sweeping argument. Moore should not be entitled to use Multiflex's successes to offset actual damage resulting from its own anticompetitive behavior. If Multiflex can prove that its injury was proximately caused by Moore's antitrust violation, we must allow recovery without offsetting this amount by the beneficial effects of Multiflex's strategic ingenuity.

Yet we cannot allow treble damages under the Clayton Act unless the injury was the type the antitrust laws were designed to protect. In this respect, charges of attempted monopolization differ from claims of actual monopolization. In the case of actual monopolization, there can be little doubt that the violation injures the marketplace and violates the public policies that the antitrust laws seek to protect. This helps explain, in part, why actual monopolization is an offense even without a showing of specific intent.

Attempted monopolization, on the other hand, does not invariably lead to the type of injury the antitrust laws seek to

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[13] Professor Areeda described the connection between public injury and private recovery in Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127, 1127 (1976).

> Money awards under the antitrust laws do not serve only to compensate injured plaintiffs. Treble damages also punish wrongdoers and enlist private plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing. But the desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are non-existent, inconsistent with antitrust policy, or unconnected with the true rationale for imposing antitrust liability. (Citation omitted.)

prevent. The attempt may fail to produce any actual antitrust injury to the marketplace. In this case, for example, the threatened injury to free and open competition never materialized except at most for a brief period. The market quickly beat a path to Multiflex's door in search of the fabled better mousetrap. The "dangerous probability of success" never progressed to success.

The seeming conflict is actually illusory, however. The offense of attempted monopolization need not cause actual market damage, but need merely threaten to produce the type of market damage contemplated in the antitrust laws. The relevant test is whether the "dangerous probability of success," *if it had materialized*, would have caused the type of market damage the antitrust laws seek to prevent. The mere attempt is the offense. *LektroVend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982).

Under such an inquiry, we have little trouble finding the necessary link between Multiflex's injury and the public policies behind the antitrust laws. Moore clearly was trying to maintain its market dominance and exclude any and all competitors. It stepped far beyond the bounds of reasonable competitive practices in trying to maintain its market position.[14] The jury implicity found that Moore had a specific intent to monopolize the market, a determination we find supported by substantial evidence. The Sedco incident is an example of the kind of sale Multiflex wanted to gain but that Moore was determined to win at all costs. Within the relevant market, Moore and Multiflex were the only substantial suppliers. It is therefore almost tautological to find that Moore's intent plus actions with an eye toward monopolization would injure Multiflex, its chief and

[14] The testimony in the record suggests a long list of Moore's anticompetitive practices. In addition to the allegation discussed earlier that Moore told customers Multiflex was insolvent and had Pinkerton guards posted at its gates, there is also evidence that detecting, disparaged the quality of the Multiflex product, overstated the pressure ratings of its own competing products, and advised potential investors that the company had no customers. Multiflex has dropped its earlier claim that the patent infringement claims that began this litigation were themselves part of an anticompetitive scheme to retain market dominance.

perhaps only, competitor. Furthermore, it seems clear that these actions interfered with the ultimate customers' free choice in the marketplace and forced them into the position of following the well-trodden path to Moore's doorstep or hewing a treacherous, uphill path to Moore's only competitor. This is the stuff of which antitrust cases are made.

Armed with the findings of overt acts, injury, and proximate relation to the intent of the statutes, we affirm Multiflex's right to recover under section 4 of the Clayton Act for Moore's attempt to monopolize in violation of section 2 of the Sherman Act. The final issue in this case is the proper quantum of damages.

IV. QUANTUM OF DAMAGE

We have concluded that Multiflex may recover on its section 2 claims and not on its section 1 claims. Normally this would lead us to uphold the section 2 award made in a district court and nullify the section 1 award. The appellate court's power to review jury damage awards is narrowly limited. *Terry* v. *Raymond Int'l, Inc.*, 658 F.2d 398, 404 (5th Cir. 1981), *cert. denied*, 456 U.S. 928, 102 S.Ct. 1975, 72 L.Ed.2d 443 (1982); *Kramer v. Keys*, 643 F.2d 382, 386 (5th Cir. 1981). However, we cannot uphold the jury's section 2 award in this case and must instead remand for a redetermination of section 2 damages.

A. The Applicable Law.

Even after showing the "fact of damage" sufficient to establish liability under section 4 of the Clayton Act, Multiflex held the burden at trial of showing a rational quantum of actual damages stemming from the antitrust violations. This showing of the "amount of damage" enjoys a relaxed burden of proof as compared to the initial "fact of damage" proof requisite to establishing liability for damages under section 4 of the Clayton Act. The burden is relaxed, in part, because once a plaintiff has shown injury through anticompetitive behavior, we do not require that plaintiff prove with exact particularity what its success might have been in the market in the absence of the illegal conduct of another. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 1929, 68 L.Ed.2d

442 (1981), *after remand*, 670 F.2d 575 (5th Cir. 1982), *cert. denied*, ____U.S.____, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982); *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 983 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). However, even under a relaxed burden of proof, there must be a rational basis by which a jury can assess the amount of antitrust damages or the award cannot stand. *Chrysler Credit Corp.*, v. *J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.), *cert. denied*, ____U.S. ____, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982), *Household Goods Carriers' Bureau* v. *Terrell*, 452 F.2d 152, 159 (5th Cir. 1971) (en banc), *appeal after remand*, 494 F.2d 16 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). We examine two aspects of the award in this case: the damage model upon which the award was based, and the relationship between the verdict and the evidence.

B. The Damage Model.

In its pleadings, Multiflex asked for approximately $550,000.00 in damages growing out of both section 1 and section 2 antitrust claims, before trebling or attorney's fees. It based this amount on a model of lost profits developed for its use by an economic consultant. The damage model was the expert's attempt to indicate what the market shares for Moore and Multiflex would have been in the absence of anticompetitive acts. It looked to the few sales made directly to end users during that period, where the expert assumed little, if any, market interference had taken place. He found that Multiflex had just over 80% of that submarket. The economist used this figure as a "yardstick" to project an 80% market share over

Multiflex's entire market. The economist's model in short, assumed that Multiflex's market share should have been just over 80% for the entire period in question, rather than the actual rise from zero to 63% over two years. The difference between the actual market share and the 80%+ theoretical market share established the basis of the expert's damage model. Typical profit margins in each submarket then produced the expert's final damage figure, based on his "yardstick" model.

At trial, the expert's damage model was attacked on many grounds. First, Moore attempted to show that the model was based on lost gross profits, rather than on the proper measure of lost net profits. *See Deaktor* v. *Fox Grocery Co.*, 475 F.2d 1112, 1116-17 (3d Cir.), *cert. denied*, 414 U.S. 867, 94 S.Ct. 65, 38 L.Ed.2d 86 (1973). The expert agreed at trial with Moore's charge that his estimates of lost profits did not account for increases in marginal production costs, as a net profit model should. This made his model more analogous to an impermissible accounting of gross profits. However, the expert expressed his opinion that marginal costs of production in this case were so small as to be irrelevant, since the majority of the costs of production were fixed rather than incremental, and Multiflex was operating below its production capacity at the time in question. He showed uncontroverted evidence that the marginal labor and electricity costs for the lost production were minimal and that to include these costs in the model would have had little effect on the damages claim. Moore presented no countering evidence at all that the marginal costs of production would be any different than the expert's estimates. In any event, the jury was entitled to weigh and evaluate the expert's opinion. We find no error in the jury accepting the expert's cost estimates.

Similarly, the expert adjusted the damage estimates to create a net present value for the previous injury. Expressing a past damage figure in present terms required an estimation of the lost opportunity cost of the capital. The estimate normally equals the interest that might have been earned on the funds if placed in alternative investments. The expert in this case developed a discount figure based on the yield available on

three-month Treasury bills on the dates in question to project the 1977-79 damages into terms of present value. Moore claims that these projections amount to nothing more than prejudgment interest, which normally would not be recoverable in this antitrust action. *See Volkswagenwerk*, 553 F.2d at 986 & n. 20. *Cf.* 15 U.S.C. § 15 (Supp. V, 1981) (prejudgment interest allowable under certain circumstances for actions commenced after September 12, 1980).

However, this Court in *Volkswagenwerk* condemned prejudgment inflation of damage claims only when the adjustments amount to nothing more than bare interest. In *Volkswagenwerk*, for example, we affirmed a net present value adjustment to a claimed loss in capital. Ruling that the adjustment was for the lost opportunity cost from the capital formation rather than a bare claim to prejudgment interest, we affirmed that portion of the award. Similarly in the present case, we find that the claims were made to reflect what the asserted lost profits would have earned in an open investment market, not as a statutory claim for prejudgment interest. Since the claim was based on an economic theory and not in a claim to statutory or common law prejudgment interest, we find no error in this portion of the award.

Moore also contests the method by which the damage model classified sales in the relevant market and time frame as foreign or domestic. The model developed by Multiflex's expert looked to the domestic or foreign location of the buyer's purchasing agent, rather than to the location of actual installation. Moore argues that a sale to an American company for installation abroad should not enter into the damage award that is concerned only with the U.S. market. The relevant market, however, is defined as sales in the U.S. market. A sale is made when a contract is formed. A contract is formed when a bid is accepted. *See* 1 A. Corbin, Corbin on Contracts §§ 55-56 (1963 ed.) We find it logical to assume that the contract bids were accepted by the buyers at their mailing addresses rather than at the location of their drilling sites. Under this view, contracts formed in the U.S. are part of the U.S. market, and those established elsewhere are not. We find no error in this aspect of the expert's analysis.

C. Support in the Evidence.

The damage model, although reasonable in other respects, does contain a fatal flaw as applied to the jury's verdict. The damages claimed were not split into components of section 1 and section 2 damage. Rather, the model projected only one total figure for the Sherman Act damages alleged under both section 1 and section 2 theories. There is no clear error in such calculations—section 1 and 2 theories often overlap in a case, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788, 66 S.Ct. 1125, 1128, 90 L.Ed. 1575 (1946), and similar facts may not only establish both violations but may result in similar or identical injury. However, the plaintiff's failure to distinguish between its section 1 and 2 injuries is relevant in this case because the jury split its verdict into an award for the section 2 damage, which we recognize, and the section 1 damage, which we reverse. Since the legal underpinnings of the jury's award do not both survive this appellate review, we must remand for retrial of the quantum of damages, based on the factors explained below.

The reason we must reverse the jury's award of section 2 damages is that there is no rational basis in the record for distinguishing between the section 1 and section 2 damage award. Nowhere in the record does either party suggest what damages might be appropriate if one theory and not the other were valid in this case.[15] The jury's bifurcation of the award

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[15] In Multiflex's single reference to the breakdown of the damage claim, made during closing argument, its attorney told the jury:

Finally, I want to talk to you a minute about one area that may be a slight problem for you on the question of damages.

Necessarily, you are going to have to look at the question on how much damages was caused by the conspiracy, how much damages was caused by the attempt to monopolize.

Of course, Multiflex lost their sales as a result of not being able to sell through the three OEM's. This was kind of a mixture of things that happened.

So, you, as the jury, are in the position of having to use your discretion in how to answer those two damage questions.

Certainly Multiflex is not claiming any more than that as their total damages in this case.

Record on Appeal, Vol. 14, at 48.

into $382,963.07 for section 1 damages and $205,964.73 for section 2 is completely unsupported in the evidence and does not represent the "substantial, credible evidence" that is a prerequisite for our upholding a jury verdict. *Gunning* v. *Cooley*, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720 (1930); *Coughlin* v. *Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978); *Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). Since we are reversing the section 1 component that served as partial support for the jury's award, we must nullify the jury's damage verdict and remand for a new trial on the damages growing out of the section 2 violation alone.

Moore raises an additional point for us to consider in examining the jury's damage award. After the jury returned its verdict, the district judge obtained the affidavits of the jury foreman and another juror. These apparently were taken because the total award was greater than the plaintiff's proof at trial. These affidavits suggest that the jury verdict might have included $200,000 to compensate Multiflex for "injury to its reputation" or to "punish" Moore for its conduct. One juror also stated that the $200,000 figure was reached by taking an average of each juror's predilection regarding such an award—a "quotient verdict." Neither theory is a proper basis for recovery in a Sherman Act claim, and Moore now asks us to overturn the jury award on the basis of jury misconduct.

Punitive damages are impermissible in an antitrust award. The treble damage provisions accomplish, in part, a similar purpose. However, we are also cognizant of the need to respect the finality of a jury verdict. In general, it is unwise to leave open to doubt the propriety or finality of a jury's decision if there is any credible basis for supporting its verdict. Rule 606(b) of the Federal Rules of Evidence discusses the limited premissible inquiry into the validity of a verdict. An affidavit discussing the jury's decision-making process is cognizable only to discover whether "extreneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed.R.Evid. 606(b). The court, therefore, properly could not consider Moore's charges that the jury awarded impermissible punitive damages or arrived at a "quotient

verdict." *Wilkerson* v. *Amco Corp.*, 703 F.2d 184 (5th Cir. 1983); *O'Rear* v. *Fruehauf Corp.*, 554 F.2d 1304 (5th Cir. 1977).[16]

The district judge in this case examined the affidavits for the single purpose of determining whether the award was supported in the evidence. He found that the award was larger than the damages shown at trial, at which point he properly offered Moore the option of remittitur in the amount of the unsupportable excess. *Carlton* v. *H.C. Price Co.*, 640 F.2d 573, 582 & n. 14 (5th Cir. 1981); *Geyer* v. *Vargas Productions, Inc.*, 627 F.2d 732, 735 (5th Cir. 1980); *Bonura* v. *Sea Land Service, Inc.*, 505 F.2d 665, 669-70 (5th Cir. 1974). The remittitur, accepted by the plaintiff Multiflex, properly reduced the award only to the extent necessary to conform to the evidence. *See Gorsailtz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1046 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir. 1972), *cert. denied*, 407 U.S. 921, 92 S.Ct. 2463, 32 L.Ed.2d 807 (1972). The district court properly handled the questions raised by the excessive amount of the verdict. Therefore, we refuse to consider Moore's arguments regarding the foundation of the verdict. However, as discussed earlier, we find the verdict unsupportable in its breakdown of damages into the section 1 and section 2 components. We still must remand, therefore, for readjudication of the damage award.

Since the jury was never instructed on the delineation between the section 1 damage and the section 2 damage when it rendered its verdict, we cannot allow the section 2 damage award to stand. It is clear that the jury intended to compensate Multiflex for the profits it lost in the years 1977, 1978, and 1979 when it was fighting its uphill battle against Moore for its rightful market share. Yet, it would be pure speculation to

[16] The draft of Fed.R.Evid. 606(b) as passed by the House of Representatives would have permitted juror testimony about objective matters occurring during the jury's deliberation, such as the reaching of a quotient verdict, *see* H.Rep. 93-650, U.S.Code Cong. & Admin.News 1974 p. 7051, but the version passed by the Senate, *see* S.Rep. No. 93-1277, and approved by the Joint Conference Committee expressly denounces such a practice, H.Rep. 93-1597. This makes clear the drafters' intent that a jury's verdict should not be open to searching the minds and motives of the jurors, and must be affirmed if there is adequate support for the award.

calculate what the jury might have awarded if presented only with the meritorious section 2 theory.

In remanding for calculation of quantum, however, we caution the district court to observe the distinction between the fact of damage growing out of the Sedco incident, which already has been determined by a preponderance of the evidence, and the amount of damage which must be calculated on remand on the basis of credible evidence presented to the jury. Since the fact of damage already has been shown with a reasonable certainty, the damages claimed on remand may be shown with a somewhat relaxed standard in this bifurcated procedure. *See MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983); *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 317-19 (5th Cir. 1978); *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 21 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

V. CONCLUSION

In summary, we reverse the jury's finding of a conspiracy in restraint of trade, violative of section 1 of the Sherman Act, 15 U.S.C. § 1; we affirm the finding of attempted monopolization, 15 U.S.C. § 2. We reverse and remand for a new trial on the issue of damages growing out of the Section 2 violation, in accordance with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED.

APPENDIX B

CIRCUIT COURT NOTICE DENYING PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 81-2405

MULTIFLEX, INC.
Plaintiff-Appellee,

v.

SAMUEL MOORE & COMPANY, AND
EATON CORPORATION,
Defendant-Appellants.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

On Petitions for Rehearing and Suggestion for Rehearing En Banc

(Opinion 7/22/83, 5 Cir., 198_, ____F.2d____)

(September 14, 1983)

Before WILLIAMS and JOLLY, Circuit Judges and WILL*, District Judge.

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* District Judge of the Northern District of Illinois, sitting by designation.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

.....

United States Circuit Judge

REHG-7

APPENDIX C
DISTRICT COURT JUDGMENT

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-78-535

MULTIFLEX, INC.,
Plaintiff,

vs.

SAMUEL MOORE & COMPANY, AND
EATON CORPORATION,
Defendants.

FINAL JUDGMENT

This cause came on for trial before the Honorable Woodrow Seals, District Judge, and a Jury on August 6, 1981, and continued through August 31, 1981, both parties appearing by counsel, and the Court having submitted special interrogatories to the Jury and the Jury having answered as follows:

SPECIAL INTERROGATORY NO. 1

During the time period in dispute in this case, do you find from a preponderance of the evidence that there existed a relevant product market or submarket consisting of only hydraulic hose bundles as alleged by Multiflex?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 2

During the time period in dispute in this case, do you find from a preponderance of the evidence that there existed a relevant geographic market or submarket consisting of only sales within the United States as alleged by Multiflex?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that Samuel Moore entered into a contract, combination or conspiracy with one or more control equipment manufacturers pursuant to which such control equipment manufacturers refused to purchase hydraulic hose bundles from the plaintiff Multiflex?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 4

If you have answered Special Interrogatory No. 3 "We do," then answer Special Interrogatory No. 4. Otherwise do not answer Special Interrogatory No. 4.

Which one or more of the control equipment manufacturers do you find from a preponderance of the evidence was engaged with Samuel Moore in a contract, combination or conspiracy as alleged by Plaintiff?

Answer by writing in names of manufacturer(s).

ANSWER: Stewart & Stevenson Oiltools
Cameron Iron Works
Valcon, Inc.

FURTHER INSTRUCTIONS: The companies alleged by Multiflex to have engaged in a contract, combination or conspiracy are: Stewart and Stevenson Oiltools, Inc. (and its successor NL Industries); Cameron Iron Works; and Valcon, Inc. The Court is not suggesting by naming those companies that you should write any one or all of those names in answer to Interrogatory No. 4, but it is merely to have the correct technical names before you in your deliberations.

SPECIAL INTERROGATORY NO. 5

If you have answered Special Interrogatory No. 3 "We do," then answer Special Interrogatory No. 5. Otherwise do not answer Special Interrogatory No. 5.

Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, constituted an unreasonable restraint of trade by adversely affecting competition in interstate commerce in the relevant market?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 6

If you have answered Special Interrogatory No. 5 "We do," then answer Special Interrogatory No. 6. Otherwise do not answer Special Interrogatory No. 6.

Do you find from a preponderance of the evidence that Plaintiff suffered injury to its business or property by reason of such contract, combination or conspiracy?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 7

If you have answered Special Interrogatory No. 6 "We do," then answer Special Interrogatory No. 7. Otherwise do not answer Special Interrogatory No. 7.

Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, was a direct and proximate cause of any injury to Plaintiff?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 8

If you have answered Special Interrogatory No. 7 "We do," then answer Special Interrogatory No. 8. Otherwise do not answer Special Interrogatory No. 8.

What amount of damages, if any, do you find from a preponderance of the evidence that Plaintiff is entitled to recover for losses proximately resulting from any such contract, combination or conspiracy?

Answer in dollars and cents, if any.

ANSWER: $382,963.07*

SPECIAL INTERROGATORY NO. 9

Do you find from a preponderance of the evidence that Samuel Moore specifically intended to monopolize any relevant market you have found to exist?

Answer "We do" or "We do not".

ANSWER: We do.

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* Based on Interrogatory No. 1, air tube bundle damages are excluded.

SPECIAL INTERROGATORY NO. 10

If you have answered Special Interrogatory No. 9 "We do," then answer Special Interrogatory No. 10. Otherwise do not answer Special Interrogatory No. 10.

Do you find from a preponderance of the evidence that Samuel Moore committed some act or acts in furtherance of its specific intent to monopolize which resulted in a dangerous probability that monopolization in the relevant market would sooner or later occur?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 11

If you have answered Special Interrogatory No. 10 "We do," then answer Special Interrogatory No. 11. Otherwise do not answer Special Interrogatory No. 11.

Do you find from a preponderance of the evidence that Plaintiff suffered any injury to its business or property by reason of any alleged acts of Samuel Moore undertaken in furtherance of any specific intent to monopolize the relevant market?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 12

If you have answered Special Interrogatory No. 11 "We do," then answer Special Interrogatory No. 12. Otherwise do not answer Special Interrogatory No. 12.

Do you find from a preponderance of the evidence that any alleged acts committed by Samuel Moore with the specific

intent to monopolize the relevant market were a direct and proximate cause of any injury to Plaintiff?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 13

If you have answered Special Interrogatory No. 12 "We do," then answer Special Interrogatory No. 13. Otherwise do not answer Special Interrogatory No. 13.

What amount of damages, if any, do you find from a preponderance of the evidence that Plaintiff is entitled to recover for losses proximately resulting from any such alleged acts committed by Samuel Moore with the specific intent to monopolize the relevant market?

Answer in dollars and cents.

ANSWER: $205,964.73.

The Jury having rendered a special verdict in favor of the Plaintiff and against the Defendants in the sum of $588,927.80, before trebling, and Plaintiff having filed with the Clerk of the Court a written consent to reduce the verdict to $549,362.98, before trebling, and said consent having been duly signed, acknowledged and filed with said clerk,

It is hereby FINALLY ORDERED, ADJUDGED and DECREED that the foregoing special verdict of the Jury, including specifically each and every Special Interrogatory and the Jury answers thereto are adopted by the Court and are incorporated in this judgment,

Based upon such Jury verdict, the Court concludes that Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, have been violated by Defendants, and each of them,

and further, Plaintiff Multiflex, Inc., shall recover of the Defendant Samuel Moore & Company and the Eaton Corporation the sum of $1,648,088.94 with interest thereon from the date of the entry of this Judgment at the rate of nine percent as provided by law.

Costs under 28 U.S.C. § 1920 are also hereby awarded to Plaintiff, and the award of the attorney fees under 15 U.S.C. § 15 shall be determined by a separate hearing before this Court upon final disposition of an appeal, if any, from this judgment, or if no appeal is taken, upon the expiration of the time for appeal from this judgment.

Dated at Houston, Texas, this 4th day of September, 1981.

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HON. WOODROW SEALS
U.S. District Court Judge